

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Family Child Care  
License of Rebecca Upegui

**FINDINGS OF FACT,  
CONCLUSIONS,  
RECOMMENDATION AND  
MEMORANDUM**

This matter was heard by Administrative Law Judge Richard C. Luis on Thursday, March 18, 2010, at the Wright County Services Building in Buffalo. The record closed with issuance of correspondence from the Administrative Law Judge on March 25, 2010.

Anne L. Mohaupt, Assistant Wright County Attorney, appeared on behalf of the Wright County Family Services Department (Local Agency) and Minnesota Department of Human Services (Department). Rebecca Upegui (Licensee) appeared on her own behalf, without counsel.

**STATEMENT OF ISSUES**

1. Whether the disqualification of the Licensee's daughter, V.U., from providing direct contact services to persons in the Licensee's family child care program should be dismissed or set aside; and

2. If the disqualification against V.U. is set aside, whether the Order of Revocation against the Family Child Care License of Rebecca Upegui should be rescinded?

Based on all the proceedings herein, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. Pursuant to an Order of the Commissioner of Human Services, issued on March 9, 2010, this is a consolidated appeal, and the Administrative Law Judge heard evidence regarding whether the disqualification of V.U. should be rescinded or set

aside, as well as evidence relating to the Licensee's appeal from the Order of Revocation issued January 12, 2010.

2. The Local Agency and the Department stipulate that the other violations listed in the January 12, 2010 Order of Revocation against Ms. Upegui's license have been corrected, or are no longer at issue in this proceeding, and that the only matter currently material to this proceeding is whether or not the disqualification against V.U. should be rescinded or set aside.

3. On August 15, 2008, V.U., who was just over 17 years old at the time, became engaged in a heated argument with her female friend, B.R., another juvenile, at the "Daze and Knights" Festival in St. Michael.<sup>1</sup> The dispute culminated when V.U. punched B.R. in the mouth, causing some minor bleeding and a swollen lower lip.<sup>2</sup>

4. B.R. and her mother decided to press charges against V.U. as a result of the incident described in the preceding Finding. V.U. was arrested and charged with violation of Minn. Stat. § 609.224, Misdemeanor Fifth Degree Assault. On October 21, 2008, V.U., pursuant to a plea arrangement, was adjudicated on a charge of disorderly conduct, and placed on probation for one year. V.U. served her period of probation satisfactorily, and she was discharged from probation on October 21, 2009.<sup>3</sup>

5. As a result of the August 15, 2008 incident, V.U., who lived then with the Licensee and helped with the daycare, was disqualified from direct contact with her mother's daycare children. V.U. requested reconsideration, which was denied.<sup>4</sup>

6. As a result of the disqualification against V.U., the Licensee's family child care license was revoked on January 12, 2010, in part because the Local Agency and the Department understood V.U. still was in direct contact with, or had access to, persons served by Rebecca Upegui's family child care program.<sup>5</sup>

7. V.U., who became a full-time student at St. Cloud State University during the fall of 2009, no longer lives with the Licensee. She is in one of the school's dormitories. V.U. anticipates gaining employment for the summer in St. Cloud, and to enroll at St. Cloud State for summer school. She plans to continue living in student housing, or to get an apartment in St. Cloud for the summer. If she lives at her mother's house for the summer, she will be away at work or school during regular daycare hours. V.U. will only be in occasional contact with the children served by her mother's daycare operation in the foreseeable future, and during such occasions that she is in contact with the recipients of daycare services at her mother's residence, she will be supervised continuously by the Licensee.<sup>6</sup>

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<sup>1</sup> Exhibit 6.

<sup>2</sup> Testimony of B.R.

<sup>3</sup> Exhibit 5, Exhibit 10.

<sup>4</sup> Exhibit 8, Exhibit 2.

<sup>5</sup> Exhibit 1.

<sup>6</sup> Testimony of V.U., Testimony of Licensee.

8. Considering the nature, severity and consequences of the event that led to V.U.'s disqualification, the minimal harm suffered by the victim, the lack of similarity between the victim and persons served by the Licensee's program, the fact that there has been no repetition of a similar event since the occasion leading to V.U.'s arrest, and the fact that V.U. will be in contact with persons served by her mother's program only occasionally, V.U. does not pose a risk of harm<sup>7</sup> to persons served by the family child care program of Rebecca Upegui.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 245A.07, and pursuant to the Commissioner's Order dismissing the internal appeal of V.U.'s disqualification, transferring that matter from an appeal before the Department's Human Services Judge to this contested case proceeding.

2. The Notice of Hearing was proper and the Department has satisfied all procedural requirements.

3. Any individual who has committed a misdemeanor violation of Minn. Stat. § 609.224 (Assault in the Fifth Degree) is disqualified from direct contact from persons receiving services from a license holder for family child care services for a period of seven years. While V.U. was not adjudicated for violation of Minn. Stat. § 609.224, the preponderance of the evidence shows that she did commit an assault against B.R. in violation of that statute.

4. The Licensee has established by a preponderance of the evidence that it is appropriate to set aside the disqualification because contact by V.U. with persons served by the Licensee's program does not present a risk of harm to daycare children.

5. It is appropriate to rescind the Order of Revocation of the family child care license of Rebecca Upegui.

Based on the Conclusions, the Administrative Law Judge makes the following:

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<sup>7</sup> Relevant considerations for "set aside" of a disqualification. Minn. Stat. § 245C.22, subd. 4(b).

## RECOMMENDATION

**IT IS RECOMMENDED** that the disqualification of V.U. from direct contact with recipients of the Licensee's family child care program be **SET ASIDE**, and that the **ORDER OF REVOCATION** issued against the family child care license of Rebecca Upegui on January 12, 2010 be **RESCINDED**.

Dated: April 7, 2010

s/Richard C. Luis

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RICHARD C. LUIS

Administrative Law Judge

Reported: Digitally Recorded

## NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 90 days to issue his final decision. If no decision is made by the Commissioner by the end of those 90 days, this Report will become the final order of the Department. Parties should contact Cal Ludeman, Commissioner of the Minnesota Department of Human Services, P. O. Box 64998, St. Paul, MN 55164-0998, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

Minn. Stat. § 245C.30, "Variance for a Disqualified Individual," provides for the grant of a variance (if the Commissioner does not set aside the disqualification against V.U.) specifying conditions under which an individual such as V.U. may be in contact with the Licensee's daycare children. It is noted that Wright County has recommended such a disposition of this matter throughout this proceeding. The Administrative Law Judge notes that the variance option may still be available in this matter, should the Recommendation to set aside the disqualification not be accepted.

**R. C. L.**